Supreme Court of the United States

OCTOBER TERM, 1942.

No. 493

EDWARD L. SCHEUFLER, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, PETITIONER,

VS.

CENTRAL SURETY AND INSURANCE CORPORATION, A CORPORATION, AND R. E. O'MALLEY, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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I.

THE OPINIONS OF THE COURT BELOW.

Lucas v. *Manufacturing Lumbermen's Underwriters et al.*, (Mo. Sup. Div. No. 2; not yet officially reported) 163 S. W. 2d 750.

Scheufler v. *Manufacturing Lumbermen's Underwriters et al.*, (Mo. Sup. *En Banc;* not yet officially reported) 163 S. W. 2d 749.

II.

JURISDICTION.

1. The jurisdiction of this Court is invoked pursuant to Judicial Code, Sec. 344, as amended by the action of February 13, 1925, 43 Stat. 937; U. S. C. A., Title 29, Sec. 344.

2. The date of the original judgment of the Supreme Court of Missouri to be reversed is May 5, 1942 (Tr. 1339); Petition for Rehearing was filed May 15, 1942, within the time provided by the Rules of the Supreme Court of Missouri (Tr. 1358); the Petition for Rehearing was denied June 17, 1942 (Tr. 1403); Motion to Transfer to the Court *En Banc* was filed in Division No. 2, June 25, 1942 (Tr. 1422); Motion for Leave to File Motion to Transfer Court *En Banc* was filed in the Supreme Court of Missouri *En Banc* on June 25, 1942 (Tr. 1403), and Leave was denied July 7, 1942 (Tr. 1469); on July 28, 1942, Division No. 2 of the Supreme Court of Missouri denied the Motion filed therein to Transfer to the Court *En Banc* (Tr. 1472).

3. Two questions are raised in this Court. The first question is whether Sections 6052 to 6069, R. S. Missouri, 1939, in respect of the powers granted to the Superintendent of Insurance to deal with the funds in individual accounts of reciprocal insurance subscribers, violate the Fourteenth Amendment to the Constitution of the United States forbidding any state to deprive any person of his property without due process of law. The second and only other question here raised is whether Sections 6052 to 6069, R. S. Missouri, 1939, in respect of the powers granted the Superintendent of Insurance to spend individual trust funds for expenses for which the individual trust funds were not liable under the contract of the subscriber, are in violation of Section 10, Article I, Clause 1, of the Constitution of the United States forbidding any state to enact a law impairing the obligation of contract.

III.

STATEMENT OF THE CASE.

The essential facts of the case are stated in the accompanying petition for certiorari and are not repeated here. It should be made clear here that the petitioner is not attacking the correctness of the Missouri Court's construction of the Missouri statutes or seeking a review of the opinion upon any other than federal grounds.

In addition to the opinions of the Court below in this cause there are two opinions of the United States District Court which bear upon the nature of the Association known as Manufacturing Lumbermen's Underwriters involved in this action. See *In re Manufacturing Lumbermen's Underwriters,* (District Court of the Western District of Missouri, 1936) 18 Fed. Supp. 114; *In re Manufacturing Lumbermen's Underwriters,* (District Court of the Western District of Missouri, 1937) 46 Fed. Supp. 343. See, also, Annotation in 94 A. L. R., beginning at page 836 on reciprocal insurance.

On the face of the principal opinion of the Missouri Supreme Court in the case at bar it would appear that no Federal question was raised. The Supreme Court of Missouri refused to discuss in either of its opinions below, the charges of unconstitutionality made in the motion for rehearing and in the motions to transfer the cause to the Court *En Banc.* The motion for rehearing was overruled without opinion. In denying leave to file in the Court *En Banc* a motion to transfer, the Court *En Banc* did not discuss the federal questions (Tr. 1470-1472). The motion to transfer to the Court *En Banc* filed in Division No. 2 was overruled without opinion (Tr. 1472).

As stated in the principal opinion of the Missouri Supreme Court, the statutes involved were new, having been enacted in 1933 and having never been judicially construed before in respect of the matters involved here.

This was a case of first impression. It was not until the Supreme Court of Missouri gave to the Insurance Code the construction which is here assailed that a definitive federal constitutional issue was raised. Prior to that time the only construction of the statutes had been by the trial court which did not give to the Code the meaning adopted later by the Supreme Court and now assailed as being in violation of the Federal Constitution. Immediately after the rendition of the opinion of the Supreme Court of Missouri containing the construction of the statutes assailed here as unconstitutional, the petitioner filed in the Supreme Court of Missouri his motion for rehearing setting up the claimed violation of the due process clause and the contract clause of the Federal Constitution (Tr. 1359-1367).

IV.

ASSIGNMENTS OF ERROR.

1. The Missouri Insurance Code (Sections 6052-6069, R. S. Missouri, 1939) as construed by the Supreme Court of Missouri to give the Superintendent of Insurance authority to pay operating expenses, rent, salaries and the like from the individual trust funds of the subscribers (the 80% remaining after 20% prepayment for expenses) without prior notice, hearing or order of court deprives the subscribers (whom petitioner here represents) of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States in this: That the funds in the hands of the Superintendent were the individual funds of the subscribers and kept in a separate account for the purpose stated in the power-of-attorney; 20% had been deducted and previously paid for operating expenses. The Insurance Code as construed by the Missouri Supreme Court (Sections 6052 to 6069, R. S. Missouri, 1939) permits the Superintendent to spend, out of the 80% held in trust for the subscribers for specific purposes, sums for operating expenses, rent and salaries in the discretion of the Superintendent without prior notice or hearing to the subscribers. The Code delegating power to the Superintendent to expend individual funds of the subscribers without prior notice or hearing is a deprival of due process of law. The Missouri Supreme Court erred in refusing to pass upon this charge of unconstitutionality and to hold the Code unconstitutional after adopting the construction given it in the case at bar.

2. The Missouri Insurance Code (Sections 6052 to 6069, R. S. Missouri, 1939) as construed by the Supreme Court of Missouri to give the Superintendent of Insurance authority to pay operating expenses, rent, salaries and the like from the individual trust funds of the sub-

scribers (the 80% remaining after 20% prepayment for expenses) without prior notice, hearing or order of court violates Section 10, Article I, Clause 1, of the Constitution of the United States in this: So construed, the laws of Missouri impair the obligation of contract embodied in the power-of-attorney entitled "Application for Insurance" (appendix to this brief p. 41). The subscribers in their power-of-attorney, a contract previously approved by the state (Sections 6078-6080, R. S. Missouri, 1939) had contracted against the use of any of their individual trust funds for the very purposes for which the Missouri law permits its use by virtue of the decision in the case at bar. The Missouri Supreme Court erred in refusing to pass upon this point and to hold the law unconstitutional on its face and in its operation, after adopting the construction given the Code in the case at bar.

V.

SUMMARY OF THE ARGUMENT.

1. Sections 6052 to 6069, R. S. Missouri, 1939, in respect of the powers of the Superintendent of the Insurance Department granted thereby to expend funds of reciprocal insurance subscribers without any notice or hearing, violate the Fourteenth Amendment to the Constitution of the United States forbidding any state to enact a law which deprives a person of his property without due process of law.

2. Sections 6052 to 6069, R. S. Missouri, 1939, in respect of the powers of the Superintendent of the Insurance Department granted thereby to expend funds of individual reciprocal insurance subscribers held in trust under the power-of-attorney for purposes contrary to the obligation of the power-of-attorney in the discretion of the Superintendent without notice or hearing in Court or before the Superintendent, impair the obligation of the contract contained in the power-of-attorney in violation of Section 10, Article I, Clause 1, of the Constitution of the United States.

3. Federal questions were timely presented in this case. It was sufficient to present the charges of unconstitutionality on motion for rehearing because the unconstitutional construction of the statute could not have been anticipated and the statutes were first construed in their unconstitutional manner by the Supreme Court of Missouri in the principal opinion below.

4. The writ should be granted in this case because the Missouri Supreme Court has decided federal questions of substance not theretofore determined by this Court (Rule 38, Subsection A—Par. 5, of this Court.)

VI.

ARGUMENT.

1. Sections 6052 to 6069, R. S. Missouri, 1939, in respect of the powers of the Superintendent of the Insurance Department granted thereby to expend funds of reciprocal insurance subscribers without any notice or hearing violates the Fourteenth Amendment to the Constitution of the United States forbidding any state to enact a law which deprives a person of his property without due process of law.

The statutes (Sections 6052-6069, R. S. Missouri, 1939) relating to the powers of the Superintendent in cases of this character violate the due process clause of the Federal Constitution. It has long been held that the action of a state in authorizing one of its administrative agencies to deal with the property of a citizen or a business subject to regulation without prior notice and opportunity to be heard on the liability of the private property to the use of the administrative agent is a deprival of due process of law. *Southern Railway Company* v. *Virginia ex rel. Shirley*, 290 U. S. 190, 78 L. Ed. 260. In this case the Supreme Court of the United States held that a state administrative agent could not, without violating the Federal Constitution, order a railway company to abolish a grade crossing and construct an overhead passage without prior notice and hearing. It was further held that an indefinite right of review later accorded was no substitute for notice and opportunity to be heard prior to action.

This principle governs the case at bar. Here, under the construction given by this Court to the statutes relating to proceedings against insurance companies, the Superintendent is empowered without notice or hearing to expend individual trust funds for purposes against which the owner of the trust fund has specifically contracted

that the funds shall not be liable, and for purposes for which in the year preceding the commencement of this action by Respondent O'Malley, the subscribers had paid $600,000 to the attorney-in-fact (Tr. 129). We will not repeat the nature of the relationship between the subscribers and the attorney-in-fact and the character of the trust fund which O'Malley violated without authority. The nature of these relationships involves a construction of the power-of-attorney which is the charter of the rights and obligations of the subscribers, the trustee and the attorney-in-fact. This is discussed lucidly and the trust funds found to be private individual funds in the thorough consideration of Judge Otis in *In re Manufacturing Lumbermen's Underwriters,* 18 Fed. Supp. 114. (The power-of-attorney is set out in 18 Fed. Supp. l. c. 117, and in the appendix to this brief at p. 41.)

The situation briefly is this: A group of reciprocal subscribers make annual deposits of $3,000,000 for the forthcoming year; the attorney-in-fact is paid 20% or $600,000 to maintain the offices, meet the payrolls and pay other expenses connected with the maintenance of the business. The remaining 80% with prior accumulations was placed in trust for the subscribers individually. A Superintendent of Insurance who confessedly is not advised of the financial condition of the association files a petition in court under the Missouri statutes. Without notice and hearing he is placed in temporary charge of the business of the association. He takes charge of the assets in the trust fund belonging to the subscribers. He does not take charge of the funds and assets of the attorney-in-fact which is still in existence nor does he require the substitute attorney-in-fact, named a party to this cause after the commencement of this suit to perform any of the obligations of the attorney-in-fact. Without notice and hearing he proceeds to expend the trust fund for the purpose of meeting the payroll and other expenses which should be borne by the attorney-in-fact or from the funds paid to the attorney-in-fact for that

purpose. When it is sought to charge him with responsibility for violating these trust funds and wasting the assets, the trial court finds that his actions have been unreasonable, exorbitant and without legal authority; that money has been spent for purposes for which the subscribers received no benefit. The Supreme Court of Missouri holds that the Superintendent has power to spend these trust funds without according the subscribers and owners thereof a notice or hearing in any form; that the discretion vested in him by law can be exercised by him without right of judicial investigation in the owners of the funds which were dissipated. That Court made this holding on the express ground that the Superintendent was merely maintaining the *status quo*. The truth is when the problem is analyzed that the Superintendent violated the *status quo* and spent individual trust funds for purposes stipulated against in the trust instrument, the power-of-attorney, and for purposes entirely unconnected with the interest of the owners. The statutes permitting such action are unconstitutional, at least, when applied to reciprocal associations such as involved here.

2. Sections 6052 to 6069, R. S. Missouri, 1939, in respect of the powers of the Superintendent of the Insurance Department granted thereby to expend funds of individual reciprocal insurance subscribers held in trust under the power-of-attorney for purposes contrary to the obligation of the power-of-attorney in the discretion of the Superintendent without notice or hearing in court or before the Superintendent, impair the obligation of the contract contained in the power-of-attorney in violation of Section 10, Article I, Clause 1, of the Constitution of the United States.

As stated by the District Court in its analysis of the structure of this company in 18 Fed. Supp. 114, the power-of-attorney is the contract which governs the rights of the parties to the reciprocal insurance association. This contract creates a trust fund of 80% of the annual deposits to

be held for the individual account of the subscribers and not subject to expenses of operation. These expenses of operation under the contract are to be paid from the funds of the attorney-in-fact which received 20% of each deposit for those purposes. The Missouri Supreme Court in this case construes the laws of Missouri to permit the Superintendent without notice or hearing being accorded the owners of the fund to impair the contract and in violation thereof to pay expenses of operation in his discretion from the subscribers' trust funds. It is well established that the obligation of a contract is unconstitutionally impaired by the action of a state in enacting and enforcing a law after execution of a contract which causes or permits action to be taken in violation of the express terms of the contract or trust created thereby. *Coolidge* v. *Long*, 282 U. S. 582, 75 L. Ed. 562. And this is true where the contract is impaired by delegated authority, *Grand Trunk W. R. Co.* v. *Railroad*, 221 U. S. 400, 55 L. Ed. 756. In the *Coolidge case*, at 282 U. S. 595, 75 L. Ed. 566, this Court said:

> "The trust deeds are contracts within the meaning of the contract clause of the Federal Constitution. They were fully executed before the taking effect of the state law under which the excise is claimed. The Commonwealth was without authority by subsequent legislation, whether enacted under the guise of its power to tax or otherwise, to alter their effect or to impair or destroy rights which had vested under them."

While in the case at bar, the Court said that the Superintendent was maintaining the *status quo*, the fact is that he required neither the attorney-in-fact Rankin-Benedict Underwriting Company nor the substitute attorney-in-fact Vincent B. Coates to respond to their obligations nor did he seize their funds. Contrary to the *status quo*, he seized the trust funds of the subscribers and used them for purposes they had specifically contracted against. The construction of the laws of the State to permit such

action is a violation of the Federal Constitution prohibiting the impairment of a contract by a state, and prohibiting arbitrary confiscation.

3. The Federal questions were timely presented in this case. It is sufficient to present the charges of unconstitutionality on motion for rehearing because the unconstitutional construction of the statute could not have been anticipated and the statutes were first construed in their unconstitutional manner by the Supreme Court of Missouri in the principal opinion below.

The statutes here involved were first construed in an unconstitutional manner on appeal to the Supreme Court of Missouri. The opinion in the case at bar clearly shows that this is a matter of first impression. Therefore it cannot be said, as it was said in *Herndon* v. *Georgia*, 295 U. S. 441, that the respondent should have anticipated the unconstitutional construction of the statutes. Consequently presentation in detail of the federal questions on motion for rehearing is sufficient presentation in point of time. *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313, 74 L. Ed. 870; *Brinkerhoff-Faris Trust and Savings Company* v. *Hill*, 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451; *Great Northern Railway Company* v. *Sunburst Oil Refining Company*, 287 U. S. 358-367, Annotations in 49 L. Ed. 413, 67 L. Ed. 556, 79 L. Ed. 1539.

And in this case here it is claimed that the construction by the highest court of this state of the statutes applicable to the contract in issue is repugnant to the Constitution of the United States.

The question involved here was expressly ruled in a case arising in Missouri in the *Brinkerhoff-Faris Trust and Savings Company case*, 281 U. S. 673, l. c. 677, 74 L. Ed. 1107, l. c. 1111 ff.

In that case the Supreme Court of Missouri construed certain tax statutes in a manner which deprived the petitioner of its right in violation of the Federal Constitution.

For the first time on rehearing the petitioner set up the violation of the Federal Constitution. There, as in this case, the petition for rehearing was denied without opinion. On certiorari the Supreme Court of the United States held that a federal constitutional question was involved and that it was timely presented and that the judgment of the Supreme Court of Missouri should be reversed. There it was said (281 U. S. l. c. 677-678, 74 L. Ed. 1111-1112):

> "The plaintiff seasonably filed a petition for a rehearing in which it recited the above facts and asserted, in addition to its claim on the merits, that, in applying the new construction of article 4 of Chapter 119 to the case at bar, and in refusing relief because of the newly found powers of the commission, the court transgressed the due process clause of the 14th Amendment. The additional federal claim thus made was timely, since it was raised at the first opportunity. *Missouri ex rel. Missouri Ins. Co.* v. *Gehner,* 281 U. S. 313, *ante,* 870, 50 Sup. Ct. Rep. 326. The petition was denied without opinion. This court granted certiorari. 280 U. S. 550, *ante,* 608, 50 Sup. Ct. Rep. 152. We are of opinion that the judgment of the supreme court of Missouri must be reversed, because it has denied to the plaintiff due process of law—using that term in its primary sense of an opportunity to be heard and to defend its substantive right."

The rule was stated by this Court in *Herndon* v. *Georgia,* 295 U. S. 441, l. c. 443, 79 L. Ed. 1530, l. c. 1532, as follows:

> "The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it. *Texas & P. R. Co.* v. *Southern P. Co.,* 137 U. S. 48, 34 L. Ed. 614, 617, 11 S. Ct. 10; *Loeber* v. *Schroeder,* 149 U. S. 580, 585, 37 L. Ed.

856, 858, 13 S. Ct. 934; *Godchaux Co.* v. *Estopinal*, 251 U. S. 179. 181, 64 L. Ed. 213, 214, 40 S. Ct. 116; *Rooker* v. *Fidelity Trust Co.*, 261 U. S. 114, 117, 67 L. Ed. 556, 563, 43 S. Ct. 288; *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 454, 455, 68 L. Ed. 382, 387, 388, 44 S. Ct. 197, and cases cited.

"Petitioner, however, contends that the present case falls within an exception to the rule—namely, that the question respecting the validity of the statute as applied by the lower court first arose from its unanticipated act in giving to the statute a new construction which threatened rights under the Constitution. There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it. *Saunders* v. *Shaw*, 244 U. S. 317, 320, 61 L. Ed. 1163, 1165, 37 S. Ct. 638; *Ohio ex rel. Bryant* v. *Akron Metropolitan Park Dist.*, 281 U. S. 74, 79, 74 L. Ed. 710, 715, 50 S. Ct. 228, 66 A. L. R. 1460; *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313, 320, 74 L. Ed. 870, 875, 50 S. Ct. 326; *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673, 677, 678, 74 L. Ed. 1107, 1111, 1112, 50 S. Ct. 451; *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 164, 77 L. Ed. 231, 236, 53 S. Ct. 98, 86 A. L. R. 298; *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U. S. 358, 367, 77 L. Ed. 360, 367, 53 S. Ct. 145, 85 A. L. R. 254. The whole point, therefore, is whether the ruling here assailed should have been anticipated."

Applying that test to this case, it is clear that the ruling could not be anticipated. The statutes were recently enacted. They had never been construed before. The Missouri Supreme Court in its opinion below states that the Code governing the conduct of the Superintendent was new, having been recently amended in 1933. The trial court had not given to the statutes the construction here assailed. It had found in favor of the petitioner on the law and on the facts. An unconstitutional construction of the statutes was certainly not the construction that would be reasonably anticipated by the peti-

tioner. Therefore petitioner's conduct meets the test of the *Herndon* case.

In determining whether the federal questions in this case were raised in time the federal decisions must be looked to. The Federal Courts consistently hold that the existence of a federal question is to be determined ultimately by the Federal Courts. *International Harvester Company* v. *State of Missouri ex Inf. Attorney General,* 234 U. S. 199, 58 L. Ed. 1276, 34 S. Ct. 859; *Brinkerhoff-Faris Trust and Savings Company* v. *Hill,* 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451.

When the motion for rehearing in this case was presented raising without doubt two serious Federal questions the Missouri Supreme Court denied the motion without opinion. The Court refused to recognize and write upon the federal questions, or even to write that the questions were not involved. The Missouri Court in its failure to write may have had in mind that line of decisions which hold that a federal question is properly in a case when the Court writes upon it whether timely presented or not. See *Great Northern Railway Company* v. *Sunburst Oil and Refining Company,* 287 U. S. 358, l. c. 367, 77 L. Ed. 360, l. c. 368. However, as stated in the *Great Northern Railway case, supra,* and in the *International Harvester Company case, supra,* the mere failure of the Court to write upon the question does not prevent further review. Therefore the failure of the Missouri Court to recognize or write upon these serious federal questions has no effect in law upon the fact of their involvement in this case.

4. The writ should be granted in this case because the Missouri Supreme Court has decided federal questions of substance not theretofore determined by this Court (Rule 38, Subsection A—Par. 5).

Petitioner submits that he has raised federal questions of substance not theretofore determined by this Court within the meaning of Subsection A, Par. 5, Rule

38 of this Court. The questions raised are referred to in points 1 and 2 of the foregoing argument.

And in this connection, petitioner submits that this is the character of case which deserves exercise of the discretionary writ of certiorari. Both for the purposes of this case and for conduct in the future, it is desirable that the validity of the Missouri Insurance Code relating to the powers of the Superintendent of Insurance in charge of a reciprocal insurance association under court order, be determined authoritatively. This Court has in the past seen fit to pass upon the constitutionality of bank and insurance liquidation and conservation measures on writ of certiorari. For example see *Doty* v. *Love*, 295 U. S. 64, 79 L. Ed. 1303, where this Court reviewed the statutes of Mississippi governing liquidation and reorganization of closed banks. See *Neblett* v. *Carpenter*, 305 U. S. 297, 83 L. Ed. 182, in which this Court reviewed the provisions of the California Insurance Code relating to rehabilitation of insurance companies in the hands of the Insurance Commissioner for conservation, liquidation and rehabilitation.

The petitioner in this cause speaks on behalf of thousands of creditors and subscribers of this reciprocal insurance association in the protection of their private rights; and in his official capacity also petitioner urges this Court to settle the serious constitutional questions here raised.

Conclusion.

Petitioner, therefore, respectfully submits that this case is one calling for the exercise by the Court of its discretionary powers, in order that the errors herein pointed out may be corrected; that the law may be properly and authoritatively settled; and in order that justice may be done. And to such end the petitioner respectfully submits that a writ of certiorari should be granted and this

Court should review the decision of the Supreme Court of Missouri and finally reverse it.

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